No. 08-541

In the Supreme Court of the United States

LEONARDO ZULUAGA-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

To qualify for cancellation of removal under Section 240A of the Immigration and Nationality Act, 8 U.S.C. 1229b(a), enacted in 1996, an applicant must establish that he "has resided in the United States continuously for 7 years after having been admitted in any status," but the period of continuous residence is "deemed to end" when the applicant "has committed an offense" that renders the alien inadmissible or removable from the United States. 8 U.S.C. 1229b(d)(1).

The question presented is whether petitioner's commission of a controlled-substance offense in 1995, before he had accrued seven years of continuous residence, prevents him from qualifying for cancellation of removal under Section 240A by virtue of the "stop-time rule" that was enacted in 1996.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Abebe v. *Mukasey*, No. 05-76201, 2009 WL 50120 (9th Cir. Jan. 5, 2009) 2
Brooks v. *Ashcroft*, 283 F.3d 1268 (11th Cir. 2002) 18
Camins v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007) 17
Chambers v. *Reno*, 307 F.3d 284 (4th Cir. 2002) 17
Davey v. *City of Omaha*, 107 F.3d 587 (8th Cir. 1997) 18
Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) 16
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 10
INS v. *St. Cyr*, 533 U.S. 289 (2001) ..... *passim*
Kaiser Aluminum & Chem. Corp. v. *Bonjorno*, 494 U.S. 827 (1990) 11
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000) 12
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000) 12
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 6, 8, 9, 10, 11, 15
Mbea v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007) 17
Medina v. *Gonzales*, 404 F.3d 628 (2d Cir. 2005) 13

Cases—Continued: Page

Olatunji v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) 17
Perez v. *Elwood*, 294 F.3d 552 (3d Cir. 2002) 13
Rankine v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003) 15
Rojas-Reyes v. *INS*, 235 F.3d 115 (2d Cir. 2000) 10, 13
Singh v. *Mukasey*, 520 F.3d 119 (2d Cir. 2008) 15
Thom v. *Ashcroft*, 369 F.3d 158 (2d Cir. 2004), cert. denied, 546 U.S. 828 (2005) 15
United States v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008) 17
Valencia-Alvarez v. *Gonzales*, 469 F.3d 1319 (9th Cir. 2006) 12, 13, 14
Wilson v. *Gonzales*, 471 F.3d 111 (2d Cir. 2006) 15
Wisniewski v. *United States*, 353 U.S. 901 (1957) 15

Constitution and statutes:

U.S. Const. Amend. XIV (Equal Protection) 18
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 2
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1182(a)(2)(A)(i)(II) 3
8 U.S.C. 1182(c) (1994) (§ 212(c)) (repealed 1996) ..... *passim*
8 U.S.C. 1227 (§ 237) 2
8 U.S.C. 1227(a)(2)(A)(iii) 4

Statutes—Continued: Page

8 U.S.C. 1227(a)(2)(B)(i) 2, 4, 12
8 U.S.C. 1229b (§ 240A) 2, 6, 10, 13
8 U.S.C. 1229b(a) (§ 240A(a)) 3, 13
8 U.S.C. 1229b(a)(2) (§ 240A(a)(2)) 5
8 U.S.C. 1229b(a)(3) (§ 240A(a)(3)) 4
8 U.S.C. 1229b(d) (§ 240A(d)) 3
8 U.S.C. 1229b(d)(1) (§ 240A(d)(1)) 3, 5
8 U.S.C. 1229b(d)(1)(B) (§ 240A(d)(1)(B) 8
8 U.S.C. 1251(a)(2)(B)(i) (1994) 12
8 U.S.C. 1254(a)(2) (1994) (repealed 1996) 12
6 U.S.C. 251 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A55) is reported at 523 F.3d 365. The orders of the Board of Immigration Appeals (Board) (Pet. App. A56-A62) and the immigration judge (Pet. App. A63-A65) are unreported. Prior relevant orders of the Board (Pet. App. A66-A68, A69-A70, A77-A79, A80-A82) and the immigration judge (Pet. App. A71-A76, A83-A87) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. A petition for rehearing was denied on July 23, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on October 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 237 of the Immigration and Nationality Act (INA), 8 U.S.C. 1227, provides that several classes of aliens are subject to removal, including those who "ha[ve] been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." 8 U.S.C. 1227(a)(2)(B)(i).

Until 1996, former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from being excluded from the country. By its terms, Section 212(c) "was literally applicable only to exclusion proceedings," but it was construed as applying to deportation proceedings as well. *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).[1]

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including controlled-substance offenses and aggravated felonies. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c) altogether, see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a more-limited form of discretionary relief. Section

[1] The Ninth Circuit recently construed Section 212(c) in accordance with its literal terms and held that it is inapplicable to an alien (like petitioner) who is already in the United States and in deportation (or the equivalent of deportation) proceedings. See *Abebe* v. *Mukasey*, No. 05-76201, 2009 WL 50120 (Jan. 5, 2009) (en banc).

240A provides the Attorney General with discretion to cancel the removal of an alien who:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a). Section 240A(d) sets forth rules for computing the time of continuous residence, including the so-called "stop-time rule":

> **(1) Termination of continuous period**
>
> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) * * * when the alien is served a notice to appear under section 1229(a) of this title, or (B) *when the alien has committed an offense* referred to in section 1182(a)(2) of this title that renders the alien inadmissible * * * or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1) (emphasis added). The "offenses referred to in section 1182(a)(2)" include controlled-substance offenses. See 8 U.S.C. 1182(a)(2)(A)(i)(II).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of an agreement to plead guilty that was made at a time when the resulting conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. a. Petitioner, a native and citizen of Colombia, entered the United States illegally in 1985 (Pet. App. A5), applied for adjustment of status on May 4, 1988 (*id.* at A8, A59-A60), and became a legal permanent resident on December 1, 1990 (*id.* at A5). On April 9, 1995, he was arrested for possession of heroin. *Id.* at A5, A74. In 1998, he was convicted in Massachusetts state court, based on a guilty plea, of illegal possession of drugs and three counts of assault and battery, for which he was sentenced to an 18-month term of imprisonment. *Ibid.* In March 1999, he was again convicted of illegal possession of heroin in violation of Massachusetts law, in connection with a 1997 arrest. *Id.* at A5.

b. On June 25, 1998, the Immigration and Naturalization Service (INS) served petitioner with a notice to appear, charging him with being removable under 8 U.S.C. 1227(a)(2)(B)(i), on account of his having been convicted of a controlled-substance offense. Pet. App. A5, A84.[2] The INS also later charged petitioner with being removable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. A5.

On May 25, 1999, at a hearing before an immigration judge, petitioner admitted all of his convictions, and the immigration judge found petitioner was removable and ineligible for cancellation of removal under Section 240A(a)(3), 8 U.S.C. 1229b(a)(3), because his 1998 assault and battery convictions were aggravated felonies. Pet. App. A5-A6, A83-A87. While petitioner's appeal of that decision was pending, his assault and battery convictions were vacated by a state court because he had not been advised of the immigration consequences of a

[2] The INS's immigration-enforcement functions have since been transferred to the Department of Homeland Security. See 6 U.S.C. 251.

conviction before pleading guilty. *Id.* at A6, A78. As a result, the Board granted petitioner's motion to reopen, allowing him to pursue his application for cancellation of removal. *Id.* at A77-A79.

c. In June 2000, on remand in the reopened proceeding, the immigration judge held that petitioner was statutorily ineligible for cancellation of removal, because he had failed to accrue seven years of continuous lawful permanent residence, as required by Section 240A(a)(2), 8 U.S.C. 1229b(a)(2). Pet. App. A71-A76. The immigration judge determined that petitioner's period of lawful residence did not begin to accrue until the date he applied for temporary resident status (May 4, 1988) and that, by operation of the stop-time rule of 8 U.S.C. 1229b(d)(1), that period ended when he committed his first controlled-substance offense less than seven years later (April 9, 1995). Pet. App. A74-A75. The Board summarily affirmed. *Id.* at A69-A70.

Petitioner filed a petition for habeas corpus in the United States District Court for the Western District of New York, which vacated the removal order and remanded the case for consideration of newly discovered evidence potentially affecting when petitioner was originally admitted to the United States. See Pet. App. A7, A68. In April 2002, the immigration judge, after considering further evidence, denied relief. *Id.* at A7, A64; see Certified Admin. R. 249-258. In May 2002, the immigration judge denied a motion to reconsider. Pet. App. A63-A65. The Board dismissed petitioner's appeals of the denial of relief and of reconsideration, concluding that petitioner had not accrued the seven years of continuous residence necessary to be eligible for cancellation of removal, and noting that he had not been eligible for any

discretionary "relief available at the time of his crime." *Id.* at A56-A62.

3. a. Petitioner filed a petition for review in the United States Court of Appeals for the Second Circuit, which denied the petition. Pet. App. A3-A55. The court rejected petitioner's contention that the stop-time rule in Section 240A is impermissibly retroactive when applied to criminal conduct that preceded its enactment. Applying this Court's two-step test for retroactivity analysis in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court of appeals first held that Congress had not "expressly prescribed" that the stop-time rule be applied to criminal offenses committed before IIRIRA's enactment. Pet. App. A14-A19.

Proceeding to the second step of the *Landgraf* analysis, the court held that the stop-time rule would not have an impermissible retroactive effect if applied to petitioner's 1995 offense, because it did not attach any new disability to his past acts. Pet. App. A21-A30. The court noted that *St. Cyr* calls for the exercise of a "commonsense, functional judgment about whether [a] new provision attaches new legal consequences to events completed before its enactment." *Id.* at A21 (quoting *St. Cyr*, 533 U.S. at 321). It then concluded that "the determinative event" in petitioner's case was his commission of a drug offense, rather than the later date of his conviction, because petitioner had engaged in no relevant "secondary conduct" after committing the offense. *Id.* at A22. It explained that deportation was not only the consequence of the retroactive application of the stop-time rule, but would also have been "the consequence [petitioner] would have received immediately following his criminal conduct." *Id.* at A23. The court distinguished *Landgraf* by noting that petitioner's case lacks

"changed consequences," because, at the time IIRIRA was enacted, petitioner had already committed a crime that "placed him in a category of aliens eligible for deportation upon conviction." *Id.* at A25-A26.

The court of appeals added that its decision "remains sound when reasonable reliance is taken into consideration." Pet. App. A26. Even if petitioner could show that he had "somehow improbably relied on the absence of the stop-time rule when he committed" his controlled-substance offense, "the retroactive application of the stop-time rule did not alter the legal consequence of his actions," and petitioner could not show any "subsequent reliance," since he "did not later enter into a transaction or engage in conduct in reliance on the availability of discretionary relief." *Id.* at A28-A29.

Finally, the court concluded that its decision was consistent with the "familiar considerations of fair notice . . . and settled expectations," Pet. App. A30 (quoting *St. Cyr*, 533 U.S. at 321), because petitioner knew when he acted that he would be deportable if convicted of a drug crime.

b. In a concurring opinion, Judge Straub disagreed with the court's conclusion that the retroactive application of the stop-time rule to petitioner's case did not change the consequences of his criminal act, because petitioner was not actually convicted before seven years elapsed. Pet. App. A31-A36. Nevertheless, Judge Straub concurred with the majority's denial of relief because petitioner could not demonstrate the type of detrimental reliance he believed to be required by circuit precedent. *Id.* at A36-A42. Judge Straub then recounted "controversy among, within, and surrounding the courts of appeals" about whether reliance is required to establish an impermissible retroactive effect,

and, if so, whether it should be subjective or objective reliance. *Id.* at A36-A55. Finally, he suggested that "perhaps" the Second Circuit should revisit or review "whether and to what extent a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect." *Id.* at A55.

The majority, however, disagreed with Judge Straub's characterization of the Second Circuit's use of reliance. Pet. App. A26 n.4. Although it acknowledged that "reliance has played an important role in our retroactivity cases in the immigration context," the court expressly rejected the suggestion that an immigrant "must show reliance in every case," and it concluded that other factors are also relevant (including fair notice and settled expectations). *Ibid.*

ARGUMENT

Petitioner contends (Pet. 15-21) that the court of appeals misapplied this Court's cases in concluding that the stop-time rule in Section 240A(d)(1)(B) of the INA, 8 U.S.C. 1229b(d)(1)(B), does not have a retroactive effect on him. He also asserts (Pet. 21-30) that there is a conflict in the courts of appeals about whether a showing of "actual reliance" on prior law is an essential element of a retroactivity claim under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). The decision below is correct, and the court of appeals' holding—which, contrary to petitioner's repeated characterizations, did not require proof of actual reliance—does not squarely conflict with decisions of this Court or of other courts of appeals.

1. Petitioner first challenges the court of appeals' application of the second step of the retroactivity analysis prescribed by *Landgraf*, arguing that it erroneously

evaluated the retroactive effect of the stop-time rule from the point at which he committed a controlled-substance offense, rather than at a later point in time (when he did nothing). The court of appeals correctly stated and reasonably applied this Court's test for retroactivity. In any event, petitioner has failed to identify any conflict with another court of appeals and seeks only error correction from this Court.

a. Although this Court has recognized a presumption against retroactive legislation, *Landgraf*, 511 U.S. at 265, "it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect." *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001). Where Congress has not expressly addressed whether a statute should apply retroactively, a court must decide whether applying the statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or *attaches a new disability, in respect to transactions or considerations already past.*" *Landgraf*, 511 U.S. at 269 (emphasis added; citation and internal quotation marks omitted). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Ibid.* (citation omitted). Rather, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 269-270. That inquiry "demands a *commonsense, functional judgment* about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *St. Cyr*, 533 U.S. at 321 (emphasis added;

citations and some internal quotation marks omitted). The Court has also explained that "the legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*." *Landgraf*, 511 U.S. at 265 (emphasis added; internal quotation marks omitted).

Citing *Landgraf* and *St. Cyr*, as well as this Court's decision in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 947 (1997), the court of appeals held that petitioner could not show "that the new law attaches a new disability on past acts," and it thus held that the application of the stop-time rule to his application for cancellation of removal was not impermissibly retroactive. Pet. App. A22-A23. Accordingly, the court of appeals rejected petitioner's contention that, for an alien who was both convicted and put into removal proceedings after IIRIRA's effective date, the application of the stop-time rule at the point he committed the relevant crime was impermissibly retroactive.

b. Petitioner contends (Pet. 16-21) that the court of appeals misapplied the second step of *Landgraf*'s retroactivity analysis by using an "unorthodox approach" involving "hypothetical scenarios." He claims that he "had the right to seek a waiver [of deportation under former Section 212(c)] so long as *the conviction and final order of removal* were entered *after*" he had acquired seven years of residency. Pet. 17 (first emphasis added). That claim is flawed.

Petitioner incorrectly assumes that he had a legitimate expectation of relief from deportation or removal, but he could not even apply for cancellation of removal under Section 240A until it took effect on April 1, 1997. See generally *Rojas-Reyes* v. *INS*, 235 F.3d 115, 120 (2d Cir. 2000). Thus, the stop-time rule did not prevent him

from qualifying for a form of relief that had been available to him when he committed his crime in 1995. Cf. *St. Cyr*, 533 U.S. at 321-325.

Petitioner also incorrectly assumes (Pet. 16-21)—as did Judge Straub in his concurring opinion (Pet. App. A31-A36)—that the court of appeals' decision depended upon the "hypothetical possibility" of petitioner's conviction, removal proceedings, and order of removal, before he acquired his seven years of residency for either suspension of deportation or waiver under Section 212(c). In fact, the court of appeals correctly determined, on the facts, that on the relevant date of the determinative event—the commission of the drug offense on April 9, 1995—petitioner was not eligible for any type of relief, and that the only consequence that attached to his actual conduct would be his ultimate deportability. *Id.* at A22-A23. As this Court stated in *Landgraf*, "[t]he legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*." 511 U.S. at 265 (emphasis added) (quoting *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990)). Thus, the court of appeals correctly rejected any suggestion that its retroactivity analysis should be based on the period *after* his commission of the criminal offense, when petitioner did not engage in any relevant conduct during that period. Pet. App. A22-A26.[3]

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[3] Petitioner suggests (Pet. 26 n.9) that, even judging from the point at which he committed his 1995 crime, he may well have been relying on the looming seven-year threshold. He does not, however, cite any courts of appeals that disagree with the decision below, which indicated it would apply its "reliance" analysis to secondary conduct (such as a decision whether to apply for relief or to plead guilty) but not to the primary conduct of committing a crime. Pet. App. A29 ("[I]t makes no sense at all to ask whether an alien, in committing a drug trafficking

Both petitioner (Pet. 17-18) and the concurring opinion below (Pet. App. A33-A35) argue that, if he had hypothetically been convicted and put into removal proceedings prior to IIRIRA, under the statute that applied at the time he committed his offense, petitioner would have been eligible to continue accruing time toward the seven-year residency requirement to apply for Section 212(c) relief.[4] But petitioner is applying for cancellation

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offense, acted with an intention to preserve [his or her] eligibility for relief under § 212(c).") (citation and internal quotation marks omitted) (second brackets in original). In fact, other courts of appeals have echoed the same sentiment. See, *e.g.*, *Valencia-Alvarez* v. *Gonzales*, 469 F.3d 1319, 1327 (9th Cir. 2006) ("[U]nlike the plea at issue in *St. Cyr*, where the alien arguably bargained for something on the basis of existing immigration law, Valencia-Alvarez cannot assert that he relied on existing immigration law when he decided to commit a crime."); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000).

[4] In the court of appeals, both the majority and Judge Straub treated the seven-year-residency requirement for eligibility for "suspension of deportation" as being interchangeable with the seven-year-residency requirement of Section 212(c). In fact, petitioner would *not* have been eligible for suspension of deportation at any time before or after IIRIRA. To be eligible for suspension of deportation, an alien, like petitioner, convicted of a controlled-substance offense under 8 U.S.C. 1251(a)(2)(B)(i) (1994) (recodified at 8 U.S.C. 1227(a)(2)(B)(i)), was required to have a physical presence in the United States for a continuous period of "not less than ten years *immediately following* the commission of an act, or the assumption of a status, constituting a ground for deportation." 8 U.S.C. 1254(a)(2) (1994) (repealed 1996) (emphasis added). Thus, in petitioner's case, because he did not commit the controlled-substance offense until April 9, 1995, and did not plead guilty to that offense until May 1998 (Pet. App. A5), and only then became deportable for having been convicted of a controlled-substance offense (*id.* at A5-A8), petitioner would have been ineligible for the discretionary relief of suspension of deportation upon commencement of his proceed-

of removal under Section 240A rather than for Section 212(c) relief. See, *e.g.*, *id.* at A78. He was not convicted of his controlled-substance offense until May 1998, and was put into removal proceedings in June 1998, long after the April 1, 1997 effective date of IIRIRA. *Id.* at A5. Under the applicable law in 1998, therefore, cancellation of removal under 8 U.S.C. 1229b(a), with its seven-year residency requirement, was the only relief available to petitioner, since both Section 212(c) and suspension of deportation had been repealed. See, *e.g.*, *Perez* v. *Elwood*, 294 F.3d 552, 560-561 (3d Cir. 2002) (because an alien's deportability is triggered by his conviction, he is not "even potentially eligible for [Section] 212(c) relief until after he was convicted"); see generally *Medina* v. *Gonzales*, 404 F.3d 628, 634 n.4 (2d Cir. 2005); *Rojas-Reyes*, 235 F.3d at 120.

c. Petitioner does not even claim that there is any conflict in the courts of appeals on the stop-time question involved in this case. Cf. Pet. 18 n.2 (citing two district-court opinions about retroactive application of the stop-time rule). In fact, the only other court of appeals decision to address circumstances similar to petitioner's—where the criminal conduct of an applicant for cancellation of removal pre-dated IIRIRA, but the conviction and the removal proceedings both came after IIRIRA—the Ninth Circuit held that the application of the stop-time rule at the point when a pre-IIRIRA of-

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ings on June 25, 1998, or even upon the Board's final decision on November 5, 2003. Cf., *e.g.*, *Valencia-Alvarez*, 469 F.3d at 1327-1328 (finding no impermissible retroactive effect in the denial of pre-IIRIRA relief because the alien had not been in the United States long enough to qualify for discretionary relief from deportation at the time he committed the underlying offense, at the time he was convicted, or when IIRIRA became effective).

fense was committed was not impermissibly retroactive. See *Valencia-Alvarez* v. *Gonzales*, 469 F.3d 1319, 1327-1330 (9th Cir. 2006).

Especially in the absence of a conflict, petitioner provides no reason to conclude that the alleged error in applying retroactivity analysis in the narrow class of cases involving the seven-year-residency test in the context of post-IIRIRA convictions for pre-IIRIRA crimes presents such an important federal question that it warrants review by this Court.

2. Petitioner also argues that the Second Circuit has "cases which actually *require* reliance in order to find an impermissible retroactive effect" (Pet. 22), that those cases are inconsistent with this Court's cases (Pet. 25-27), and that "[t]here is a clear split" in the courts of appeals "as to whether reliance must be established to demonstrate that a law has a retroactive effect" (Pet. 27). There is, however, no conflict between the court of appeals' reasoning and this Court's precedents, and this case in any event would be an inappropriate vehicle for resolving any disagreement about the use of reliance in retroactivity analysis.

a. Petitioner repeatedly contends (Pet. 15, 21, 25-26 & n.8) that the court of appeals erred by "requir[ing]" him to demonstrate actual, detrimental reliance on the pre-IIRIRA state of the law in order to show an impermissible retroactive effect. The court of appeals, however, specifically rejected that characterization of its holding. See Pet. App. A26 n.4 ("[W]e have never stated that petitioners must show reliance in every case."). Moreover, the court also stated that it would still reach the same result even if petitioner had actually "relied on the absence of the stop-time rule when he committed the

offense." *Id.* at A29. That alone suffices to make further review of this question unwarranted in this case.[5]

b. When stripped of petitioner's recharacterization of its reasoning, the court of appeals' opinion—which took account of reliance, but did not make it dispositive—was obviously not inconsistent with this Court's cases. In fact, its reasoning was not even inconsistent with petitioner's own account of this Court's cases. Petitioner concedes (Pet. 23) that "detrimental reliance" may "be illustrative" in certain cases—and that this Court's opinion in *St. Cyr* "emphasized the detrimental reliance by the respondent and other similarly-situated individuals." By taking "reasonable reliance * * * into consideration" (Pet. App. A26), along with fair notice and settled expectations (*id.* at A30), the court of appeals here was faithfully following this Court's lead. See *Landgraf*, 511 U.S. at 270 ("Any test of retroactivity * * * is unlikely to classify the enormous variety of legal changes with

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[5] The actual-reliance rule that petitioner infers from prior Second Circuit cases does not stem from cases involving circumstances like his own. In the cases petitioner cites (Pet. 25), the Second Circuit dealt with aliens who had not only committed their crimes before IIRIRA but who also pleaded guilty or were otherwise convicted before IIRIRA. See *Singh* v. *Mukasey*, 520 F.3d 119 (2008); *Wilson* v. *Gonzales*, 471 F.3d 111 (2006); *Thom* v. *Ashcroft*, 369 F.3d 158 (2004), cert. denied, 546 U.S. 828 (2005); *Rankine* v. *Reno*, 319 F.3d 93, cert. denied, 540 U.S. 910 (2003). As the court of appeals noted here, the only conduct of petitioner's that preceded IIRIRA was his commission of a controlled-substance offense. After that, he "did no more than passively await the outcome of his prosecution" (Pet. App. A22), which took place after IIRIRA's effective date.

Of course, to the extent that petitioner relies upon disagreement between the majority of the court of appeals and Judge Straub about the import or applicability of prior circuit precedent, this Court does not sit to resolve such intra-circuit disputes. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

perfect philosophical clarity. However, * * * familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance."); *St. Cyr*, 533 U.S. at 321 ("As we have repeatedly counseled, the judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.") (citations and internal quotation marks omitted).

This Court recently confirmed the importance of reliance in *St. Cyr*'s retroactivity analysis. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court described *St. Cyr* as having "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (internal quotation marks omitted). Distinguishing the situation of *Fernandez-Vargas* from that of *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

c. Nor is there any direct conflict between the decision below and those of other courts of appeals. While petitioner cites (Pet. 27-29) cases dealing with the question of whether reliance is necessary to show a retroactive effect, and if so, whether it should be subjective or objective reliance, none of those cases involved application of the stop-time rule to pre-IIRIRA offenses, nor circumstances (like petitioner's) in which the relevant criminal conviction postdated IIRIRA's effective date.

Instead, they generally involved the retroactive effect of the repeal of Section 212(c), as applied to aliens who had committed crimes and had pleaded guilty or had been convicted *before it was repealed.* One exception is the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004) (cited at Pet. 29), which involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 396, rather than loss of access to Section 212(c) relief. But *Olatunji* predated this Court's decision in *Fernandez-Vargas* reiterating the relevance of reliance as a factor in retroactivity analysis. *Olatunji* also illustrates the importance of comparing cases involving the same statutory provisions, since *Olatunji* itself (which eschewed using reliance as a component of retroactivity analysis) distinguished a prior Fourth Circuit decision that had considered reliance in the context of Section 212(c)'s repeal. *Id.* at 392 (discussing *Chambers* v. *Reno*, 307 F.3d 284, 293 (4th Cir. 2002); see also *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007) (post-*Olatunji* decision, following *Chambers* and holding that the repeal of Section 212(c) "did not produce an impermissibly retroactive effect as applied to an alien convicted after [pre-IIRIRA] trial," because, by deciding to go to trial rather than plead guilty, the alien had not relied on the potential for discretionary relief).[6]

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[6] Among the 11 other cases petitioner cites (Pet. 27-29 & n.11), only four did not involve the relevance of pre-repeal convictions to Section 212(c)'s repeal. Like *Olatunji*, *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007), involved brief trips abroad, though the court required a showing of objective reliance, which was satisfied in that case by a pre-IIRIRA guilty plea. *United States* v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008), presented a question about the retroactive repeal of Section 212(c), though it involved a post-

Moreover, as noted above, the decision below did not hold that reliance is a necessary factor in proving an impermissibly retroactive effect. By treating reliance as a relevant (though not necessary) factor, and siding against petitioner *even on the assumption that he could show actual reliance* (Pet. App. A26 n.4, A29), the court of appeals' reasoning has obviated the significance of any conflicts about the role of reliance for purposes of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AEDPA, pre-IIRIRA conviction. In *Brooks* v. *Ashcroft*, 283 F.3d 1268 (11th Cir. 2002), the court considered an Equal Protection challenge and found that it had no jurisdiction to address retroactivity. See *id.* at 1274 & n.6. *Davey* v. *City of Omaha*, 107 F.3d 587 (8th Cir. 1997), arose outside the immigration context.